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Nos. 10-244, 10-245

IN THE

Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY, *et al.*,
Petitioners,

v.

CHUBB INDEMNITY INSURANCE COMPANY, *et al.*,
Respondents.

IN RE THE TRAVELERS INDEMNITY COMPANY, *et al.*,
Petitioners.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit and On Petition for a Writ of Mandumus

BRIEF IN OPPOSITION FOR RESPONDENT CHUBB INDEMNITY INSURANCE COMPANY

WILLIAM P. SHELLEY *
JACOB C. COHN
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103
(215) 665-2000
wshelley@cozen.com

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

RULE 29.6 DISCLOSURE

Chubb Indemnity Insurance Company ("Chubb") is a wholly-owned subsidiary of Federal Insurance Company, which in turn is a wholly owned subsidiary of The Chubb Corporation, which is publicly held. No publicly held company otherwise directly or indirectly owns 10% or more of Chubb Indemnity Insurance Company.

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BRIEF IN OPPOSITION FOR RESPONDENT CHUBB INDEMNITY INSURANCE COMPANY

INTRODUCTION

There is no reason for this Court to revisit what two Justices referred to at prior argument as this "mysterious" case. Travelers' breathless predictions of the demise of orderly bankruptcy proceedings are baseless. The sky is not falling, and there is no threat to Section 524(g) bankruptcy trusts. The Second Circuit's rulings have nothing to do with the disposition of estate assets, the discharge of debtors,

or the ability to bind future asbestos claimants, through virtual representation, to a reorganization plan that cuts off claims against insurers that are derivative of a debtor's own liabilities. The Second Circuit instead applied "bedrock concepts of due process of law" that did "not break any new ground relating to the constitutional requirements of an *in rem* bankruptcy proceeding" to vindicate Chubb's due process rights to adequate notice and representation when the bankruptcy court purportedly undertook in 1986 to cut off Chubb's independent, potential future claims against Travelers. (App. 4a, 49a).

Travelers' assertion that the Second Circuit disregarded this Court's mandate is unfounded. Chubb's properly-preserved due process challenge is the precise issue that this Court invited the Second Circuit to "take up" on remand. When it did so, the Second Circuit determined, in the words of *Bailey*, that Chubb "was not given constitutionally sufficient notice of the 1986 Orders," nor was it adequately represented at the proceedings, "so that due process absolves it from following them, whatever their scope." The Second Circuit did revisit its prior jurisdictional holding, but that court's reaffirmation of its prior jurisdictional determination did not arise in the context condemned by this Court, i.e., entertaining an improper collateral attack on a final order by participants in the prior proceeding. Instead, the Second Circuit's analysis was undertaken in the distinct context of considering Chubb's due process objections—specifically, to evaluate the district court's ruling, and Travelers' argument, that the *in rem* nature of bankruptcy court proceedings excused compliance with otherwise applicable, "bedrock," due process requirements of adequate notice and representation. In this context, the Second Circuit's juris-

dictional holding was wholly appropriate, and in no sense violated this Court's mandate.

Additionally, there is no cause for review here because the Second Circuit correctly sustained Chubb's due process argument in light of Travelers' concession that the "Direct Action" claims were "unimaginable" in the 1980s, and because no attempt was made then to provide virtual representation to Chubb. Moreover, the Second Circuit's conclusion is buttressed by the facts that (1) the 1984 published notices were never intended to be directed toward Chubb; (2) the Bankruptcy Court's September 26, 1985 Order confirmed that Manville and Travelers were not seeking an injunction that would have affected Chubb's rights; and (3) no subsequent effort was made to give Chubb notice in 1986 that the Bankruptcy Court nevertheless intended to enter an injunction affecting Chubb's rights.

Travelers' arguments, moreover, would require the Court to review, through a most inappropriate vehicle, issues of bankruptcy and constitutional law that have vexed courts and scholars for decades, i.e. the existence and extent of a bankruptcy court's power to provide non-consensual releases of third party claims against non-debtors. As the Court will recall from the briefs of the parties and the *amici* in *Bailey*, there is a circuit split of authority as to when, if ever, a bankruptcy court may enter an order providing for the non-consensual release of one non-debtor's claim against another (although no circuit has approved the release of claims against non-debtors that were not derivative of the liability of the debtor itself). Whatever division of authority may exist regarding the propriety of third-party releases is not implicated by this case, however, since no court

has even suggested that such a release may be enforced against a party who did not receive constitutionally adequate notice. Because the Second Circuit's decision was a routine application of settled due process law on the issue of notice, and concerns a bankruptcy court's release of concededly non-derivative, third-party claims against a non-debtor, both the substance and posture of this case make it a particularly poor vehicle for this Court to attempt to address the permissible limits of non-debtor releases in bankruptcy.

Finally, *certiorari* is inappropriate because review of Travelers' alleged points of error would be precluded by Chubb's independent, alternative challenge to the bankruptcy court's attempted exercise of subject matter jurisdiction over Chubb in 2004. Specifically, the bankruptcy court's remnant subject matter jurisdiction to enforce its 1986 Orders extended only to alleged violators of its 1986 Orders. Because Travelers never claimed that Chubb had attempted to violate those orders, the bankruptcy court had no jurisdiction in 2004 to hale Chubb before that court, much less to enter an order purporting to approve what amounted to a mandatory class-action settlement and "clarify" or otherwise affect Chubb's rights as a condition of that settlement.

The petitions should be denied.

STATEMENT OF THE CASE

I. MAY-AUGUST 1984–THE TRAVELERS SETTLEMENT AND NOTICE PROGRAM, AND APPOINTMENT OF THE FUTURE CLAIMANTS' REPRESENTATIVE

Johns-Manville Corporation ("Manville") filed for bankruptcy protection in 1982 in the face of an over-

whelming number of asbestos claims, while simultaneously embroiled in protracted insurance coverage litigation with its insurers, including Travelers Indemnity Co. ("Travelers"). On May 25, 1984, Manville announced that it had tentatively settled with Travelers and a settlement agreement was executed in July. (SA-34-35).[1] On August 2, 1984, Manville submitted an Application seeking approval of its insurance settlement agreement with Travelers and several other insurers. (SA-1-37). Effective August 1, 1984, the bankruptcy court appointed a Future Claimants' Representative ("FCR") to provide virtual representation for future asbestos personal injury claimants against Manville. (App. 10a).

Manville's August 2, 1984 settlement-approval Application represented that the requested injunction pertained solely to claims seeking to reach property of Manville's estate. (SA-9). Manville likewise requested leave to publish notice of the proposed settlement because the contemplated "'channeling' mechanism and injunctive relief" would affect the rights of "those who might assert *an interest in the insurance policies and the Debtors' claims against the Settling Carriers.*" (SA-58) (emphasis added). Manville never provided notice that it intended to enjoin independent claims of third persons against Travelers or suggested any intention to direct notice to such persons.

The August 2, 1984 Notice of Hearing was addressed solely to *Manville's* "CREDITORS, CLAIMANTS, EQUITY SECURITY HOLDERS AND INTERESTED PARTIES," giving notice of "a hearing pursuant to Rule

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[1] References to "A-__" and "SA-__" are to the Appendix and Supplemental Appendix filed in the Second Circuit.

9019 of the Bankruptcy Rules . . . to consider approval of a proposed compromise and settlement of various claims heretofore asserted by Johns-Manville Corporation . . . against Travelers Indemnity Company . . . and various counterclaims heretofore asserted by them against the Debtors." (SA-38). Chubb never insured Manville, and was not a Manville creditor, claimant, or equity security holder or a party in interest in Manville's bankruptcy case. Moreover, the notice was not addressed to persons holding claims against Travelers unrelated to the *res* of the estate.

II. SEPTEMBER 1984-JUNE 1985–JURISDICTIONAL OBJECTIONS TO THE PROPOSED INSURANCE INJUNCTION AND THE JUNE 3, 1985 LETTER AGREEMENT AMENDING THE SETTLEMENT AGREEMENT TO RESOLVE THOSE OBJECTIONS

Beginning in September 1984, two creditors' committees repeatedly raised jurisdictional objections to the Settlement Agreement, arguing that the proposed injunction against the pursuit of "Policy Claims," defined as "any and all claims . . . against [Travelers] based upon, arising out of or relating to the Policies," exceeded the bankruptcy court's subject matter jurisdiction because "the release and injunction sought by Manville would affect even those claims held by persons who have no current or potential claim against Manville." (SA-97; *see also* A-578-79, SA-99, SA-127, SA-139, SA-160, SA-185-86). Manville, on the other hand, repeatedly insisted that "Manville seeks only to release the Settling Insurers from the rights Manville might itself have had against them or rights derivative of Manville's rights

under the policies being compromised and settled." (A-1025; *see also* A-1021-22, A-1089; A-1104).

Ultimately, Travelers and Manville executed the June 3, 1985 letter agreement "clarif[ying] the intent of the parties" and amending the Settlement Agreement and its exhibits—including the proposed channeling injunction—to the extent necessary to ensure that the scope of the injunction remained within the bounds of the bankruptcy court's *in rem* jurisdiction. (SA-424). Specifically, they agreed that "[t]he channeling order is intended only to channel claims against the *res* to the Settlement Fund and *the injunction is intended only to restrain claims against the res (i.e., the Policies) which are or may be asserted against the Settling Insurers.*" (SA-422, 426) (emphasis added).

III. SEPTEMBER 1985-PROVISIONAL APPROVAL OF THE TRAVELERS SETTLEMENT, INCORPORATING THE JUNE 3, 1985 LETTER AGREEMENT

Contrary to Travelers' statements both here (Cert. Pet. at 21) and in *Bailey* (Reply Br. at 6, n.1), the June 3, 1985 letter was no "private" agreement, nor mere "correspondence" among the parties. Indeed, it was in reliance upon this agreement that the objectors withdrew their objections and the bankruptcy court ruled that it had the power to approve the settlement—facts that the Second Circuit, on remand, found highly relevant in evaluating Chubb's due process challenge. Following execution of the June 3 letter, Manville sought an interim order declaring that the bankruptcy court had power to approve the settlement and reserving for the future a hearing on the economic sufficiency of the proposed settlement.

At a September 26, 1985 hearing on Manville's application, the FCR's counsel emphasized that the letter agreement was an exhibit to the proposed Order and "obviously" was to be an "integral part" of the order. (SA-209-10). The bankruptcy court expressly adopted the FCR's recitals:

> [The FCR's counsel has summarized] the comprehension or understanding of all parties that were involved in the . . . elimination of the presentation to the Court as to certain legal issues which are resolved by this Order . . . and the Court agrees, and to the extent this record is necessary to express the Court's agreement in that regard I do express it. And under these circumstances and based upon the formality of the withdrawal of the objections . . . I am prepared to sign the Order."

(SA-214-15).

The bankruptcy court's order recited that the June 3, 1985 letter agreements "confirm[ed] the intent of the parties with respect to various provisions of the Settlement Agreement . . . ." (SA-220-22). Relying upon Travelers' representations, the court determined that it "has the power and the authority to approve the Settlement Agreement . . . together with Exhibits B and C . . . [and] has the power and authority to enter the orders required thereby." The court then approved the Travelers settlement "subject only to the result of a [future] hearing at which the court will consider . . . as a factual matter, whether the amounts paid in settlement fall within the range of reasonableness . . . ." (*Id.*).

Therefore, as of September 26, 1985: (1) Manville and Travelers had amended their settlement agree-

ment and proposed injunction to provide that "the injunction is intended only to restrain claims against the *res* (*i.e.*, the Policies)," resolving the jurisdictional objections; (2) to formalize this understanding, the bankruptcy court incorporated the June 3 letter as an "integral" part of its provisional approval order; and (3) the only issue remaining for consideration was the adequacy of the proposed settlement amount.

IV. OCTOBER-DECEMBER 1986–APPROVAL OF THE SETTLEMENT AGREEMENT AND CONFIRMATION OF THE REORGANIZATION PLAN

Over a year later, the bankruptcy court issued a "Notice of Hearing to Consider Approval of Compromise and Settlement of Certain Insurance Litigation" "to resume consideration of the . . . 'Original Settlement Agreement'" with Travelers. (SA-562-63). There was no suggestion that the prior understandings incorporated in the September 26, 1985 order would not be honored or would be altered. To the contrary, the order scheduling the hearing referenced "the minutes taken before me at the hearings held pursuant to the August 2, 1984 Order . . . , and upon all the proceedings heretofore had herein[.]" (SA-571).

In December 1986, the bankruptcy court issued two orders (the "1986 Orders"). The Insurance Settlement Order (containing the Insurance Injunction) granted final approval of the Travelers settlement and enjoined all persons from suing Travelers for "Policy Claims," which again were defined as "any and all claims . . . which have been, or could have been, or might be asserted by any Person against [Travelers] based upon, arising out of or relating to the Policies" issued by Travelers. The Confirmation

Order (containing the main Channeling Injunction) barred all current and future claimants from asserting claims against Manville and other protected parties (including Travelers) that arise from or are derivative of Manville's own liabilities and channeled such claims to the Manville Trust for consideration and payment.

The Insurance Injunction channeled "Policy Claims," to the insurance "Settlement Fund," which, in turn, was deposited into the Manville Trust pursuant to the Confirmation Order. Policy Claims subject to the Insurance Injunction thus were channeled to the Manville Trust for consideration and payment. Significantly, however, no provisions were made for the Manville Trust to address or pay compensation for independent tort claims against Travelers that neither seek to recover under the Policies nor to recover indirectly for claims against Manville.

The Second Circuit affirmed the order confirming the Manville plan. *See Kane* v. *Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988). Separately, it upheld the validity of the injunction barring the assertion of Policy Claims against Manville's insurers against a challenge by MacArthur Corporation, a Manville asbestos distributor, which claimed to be a co-insured under the settled insurance policies. Construing the injunction as barring claims that "seek to collect out of the proceeds of Manville's insurance policies on the basis of Manville's conduct," the court held that the bankruptcy court's established power to preserve the *res* and adjudicate competing claims to the *res*—including the insurance policies and settlement proceeds—extended to enjoining claims that sought to recover out of the policy proceeds. *MacArthur Co.* v. *Johns-Manville Corp.*, 837 F.2d 89, 92-93 (2d Cir.

1988) (App. 287a). The court further rejected MacArthur's due process complaint that it was entitled to receive notice before the insurance settlements had been negotiated, ruling that due process was satisfied by providing MacArthur with notice and a hearing prior to the settlements' approval. (App. 291-92a).

V. THE 2002 ENFORCEMENT PROCEEDINGS

In 2001, asbestos claimants started suing Travelers and other insurers, including Chubb, in so-called "Direct Actions," either under state consumer protection statutes or under certain state common law theories, alleging liability for wrongdoing independent of any tortious conduct by Manville. In 2002, Travelers asked the bankruptcy court to enjoin these actions as prohibited "Policy Claims" under the 1986 Orders because, Travelers alleged, virtually all of its knowledge of the hazards of asbestos came from its insurance relationship with Manville. Without ruling on the motion, the bankruptcy court issued a temporary restraining order and directed the parties to mediate.

VI. THE 2004 SETTLEMENTS AND THE "CLARIFYING" ORDER

In 2004, the mediation resulted in three settlements. Travelers agreed to pay nearly $500 million to the claimants and their counsel to settle lawsuits that it claimed were already barred by the 1986 Injunctions. But Travelers insisted on tying its settlements to a mechanism for cutting off any further Direct Action claims against it and any potential indemnity or contribution claims from its insurer co-defendants in the Direct Actions. Therefore, in addition to enjoining present claimants then

before the court—all of whom had already agreed to dismiss their pending suits and release their claims—the "clarifying" order Travelers sought pursuant to the Common Law Direct Action settlement would bar all *future* Direct Actions by parties not before the court. (A-817). The Direct Action claimants and their counsel, formerly the respondents to Travelers' enforcement motions, agreed to withdraw their contention that the 1986 Orders did not bar the Direct Actions and to cooperate with Travelers to obtain an order purporting to bar future Direct Actions, and related indemnity and contribution claims, by absent and future claimants.

Before June 2004, the bankruptcy court did not purport to exercise its remnant enforcement jurisdiction over anyone other than those plaintiffs and their counsel who were actually alleged to be violating the 1986 injunctions. That changed when Travelers filed motions to approve the settlement agreements. Court-approved notices of the proposed settlement and approval hearing were published and mailed to individuals who previously had submitted asbestos bodily injury claims against the Manville Trust (but not to any of Travelers' co-defendants in the Direct Actions such as Chubb). The notices were only intended to apprise people who "filed or resolved an asbestos-related personal injury or wrongful-death claim or may do so in the future," that their "rights to file claims against Travelers Property Casualty Company and affiliated Travelers entities may be affected if a settlement is approved by the Court." (A-887-94).

Chubb never insured Manville, and had not previously been a party to any proceedings in the Manville bankruptcy. But as a co-defendant with

Travelers in certain Common-Law Direct Actions, Chubb would be enjoined under the proposed Common-Law Direct Action settlement from bringing potential contribution and indemnity claims against Travelers in the event Chubb were held liable on claims for which Travelers shared liability. Chubb accordingly filed a limited objection to the proposed Common-Law Direct Action settlement urging that the Bankruptcy Court had no jurisdiction or discretion to undertake to affect any of Chubb's rights, and that to the extent the 1986 injunctions purported to do so already, they were unenforceable as against Chubb.

On August 17, 2004, the bankruptcy court overruled all objections, approved the settlements, and entered the "clarifying" order. The bankruptcy court reasoned that "the evidence . . . establishes that the direct action claims against Travelers are inextricably intertwined with Travelers['] long relationship as Manville's insurer." (App. 258a). Relying on that premise, the bankruptcy court "clarifie[d]" that all present and future Direct Actions "are—and always have been—permanently barred" by the 1986 injunctions. (App. 259a). The bankruptcy court further held that all contribution or indemnity claims against Travelers in connection with the Direct Actions were likewise barred. (App. 267-68a). The bankruptcy court further declared that all future claims "against Travelers that directly or indirectly are based upon, arise out of or relate to Travelers['] insurance relationship with Manville or Travelers['] knowledge or alleged knowledge concerning the hazards of asbestos" were barred. (App. 273a).

The bankruptcy court never addressed Chubb's due process objection. The court instead ruled that Chubb's objections had been rendered "moot" by a

limited judgment reduction provision that had been added to the Clarifying Order.

VII. THE APPEALS AND THE *BAILEY* DECISION

The district court largely affirmed the bankruptcy court's order, but vacated a "gatekeeping" provision requiring any plaintiff wishing to bring a suit against Travelers in state court "arising out of any policy of insurance provided by Travelers to a policyholder other than Manville" first to seek leave from the bankruptcy court. (App. 156a-160a). That court rejected Chubb's due process argument because Chubb was a "sophisticated insurer with asbestos-related insurance policies," and therefore the bankruptcy court's August 2, 1984 Notice "should have put Chubb . . . on notice with regards to whatever asbestos-related claims it may have against Travelers and the other settling insurers." The district court further relied upon the Second Circuit's 1988 rejection of MacArthur's unrelated due process challenge to the Travelers settlement. (App. 163-64a).

Additionally, the district court rejected Chubb's argument that Chubb was in the position of an unrepresented future claimant in the 1980s that could not receive constitutionally adequate notice concerning claims that, as Travelers' conceded (A-1217), were "unimaginable" in the 1980s. The district court reasoned that, "[u]nlike the class action settlements in *Amchem* and *Ortiz*," which involved exercises of *in personam* jurisdiction over asbestos manufacturers, "the injunction here is based on the Bankruptcy Court's *in rem* power over the Manville estate." (App. 164a). The district court therefore concluded that the supposedly *in rem* nature of the prior proceedings created "an exception to the due process concerns

raised by Chubb" because the bankruptcy code creates "'a special remedial scheme'" that allows for the foreclosure of "'successive litigation by nonlitigants.'" (*Id.* (quoting *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 846 (1999))).

In 2008, the Second Circuit vacated the bankruptcy court's order. The Second Circuit believed that the bankruptcy court's 2004 order improperly expanded the scope of the 1986 Injunctions by interpreting the term "Policy Claims" to include Direct Actions against Travelers that did not seek to hold Travelers liable for Manville's conduct or recover against the proceeds of the insurance policies or settlement that constituted property of Manville's estate. Accordingly, the Second Circuit ruled that "while there is no doubt that the bankruptcy court had jurisdiction to clarify its prior orders, that clarification cannot be used as a predicate to enjoin claims over which it had no jurisdiction." (App. 106-07a). The Second Circuit noted, but did not address, Chubb's independent due process argument. (App. 105-06a n.17).

This Court granted *certiorari*, and reversed by a 7-2 majority in *Bailey*, 129 S. Ct. 2195. The Court rejected the Second Circuit's conclusion that the 2004 "Clarifying Order" impermissibly expanded the scope of the 1986 Orders. Instead, this Court found that, whether or not permissible, the definition of "Policy Claims" in the 1986 Insurance Settlement Order in fact unambiguously barred even non-derivative claims against Travelers. The Court therefore concluded that, even if the bankruptcy court exceeded its jurisdiction in 1986, the Second Circuit had impermissibly countenanced a collateral attack on a final order in violation of principles of *res judicata* to the extent that the challenge was raised by parties to

the 1986 proceedings or those in privity with them who "were given a fair chance to challenge the Bankruptcy Court's subject-matter jurisdiction." (App. 72a).

The Court emphasized that its "holding is narrow. We do not resolve whether a bankruptcy court, in 1986 or today, could properly enjoin claims against nondebtor insurers that are not derivative of the debtor's wrongdoing." (App. 74a). Further, the Court emphasized that it was not decid[ing] whether any particular respondent is bound by the 1986 Orders," and noted Chubb's position "that it was not given constitutionally sufficient notice of the 1986 Orders, so that due process absolves it from following them, whatever their scope," and authorized the Second Circuit, on remand, to "take up this objection and any others that respondents have preserved." (App. 75a).

VIII. THE SECOND CIRCUIT'S 2010 OPINION

Following remand, the Second Circuit addressed Chubb's due process argument and declared, "In our view, Chubb is correct." (App. 4a). Applying "bedrock concepts of due process of law," the court opined that "both the bankruptcy court and the district court erred in rejecting Chubb's due process argument" and "conclude[d] that Chubb was not afforded constitutionally sufficient notice of the proceedings that led to the entry of the 1986 orders by the bankruptcy court. As such, Chubb is not bound by the bankruptcy court's 2004 interpretation of those orders" as it would "offend fundamental notions of due process to bind Chubb to [those] Orders." (App. 4-5a, 30a).

The Second Circuit rejected the bankruptcy court's blanket conclusion that any claims by Travelers'

Direct Action insurer co-defendants were barred by the Insurance Injunction as "put[ting] the proverbial cart before the horse by assuming that Chubb was bound by the 1986 Orders." (App. 31a). The court further rejected the bankruptcy court's ruling that a judgment reduction provision inserted in the Clarifying Order rendered Chubb's due process argument "moot." (*Id.*).

The court then addressed the district court's analysis of Chubb's due process argument. First, the court held that *MacArthur's* holding regarding the adequacy of notice was not *res judicata* as to Chubb because Chubb was neither a party to the 1986 proceedings nor in privity with any party thereto. (App. 33-34a). Further, the court held that the discretionary "law of the case" doctrine was inapplicable because the due process claim rejected in *MacArthur*, involving an alleged coinsured asserting Manville-derived claims who received actual notice of the settlement approval proceedings "and was well aware of its interest in the matter," was "readily distinguishable" from Chubb's claim that it received no notice at all of the settlement approval proceedings that purported to cut off non-Manville derived contribution and indemnity claims against Travelers that were "unimaginable" in 1986. (App. 34-35a).

Next, the Second Circuit addressed the district court's conclusion that bankruptcy's "special remedial scheme" created an "exception to the due process concerns raised by Chubb." (App. 35a). The court observed that the special powers of bankruptcy courts exist to adjudicate claims against a debtor and to control the disposition of property of the estate and are fundamentally *in rem* in nature. (App. 38a). Further, the court noted that Chubb's potential

"claims, like the vast majority of the Direct Actions, are not derivative of Manville's liability and do not seek to collect from [the Travelers Policies that were] the *res* of the Manville estate." (App. 37a).

In the context of this analysis, the Second Circuit revisited its prior jurisdictional ruling and "remain[ed] persuaded" that the 1986 Orders, as interpreted by the bankruptcy court to reach non-derivative claims against Travelers, "exceed[ed] the bounds of the bankruptcy court's *in rem* jurisdiction" over estate property by barring *in personam* claims against non-debtor Travelers. (App. 39a). Recognizing *Bailey's* holding that "parties who were present or represented in the proceedings that led to the entry of the 1986 Orders are barred from collaterally attacking the bankruptcy court's 2004 interpretation," the Second Circuit nevertheless concluded that, in evaluating Chubb's distinct due process challenge, its "analysis must take into account the *in personam* manner in which the 1986 Orders were interpreted by the bankruptcy court in 2004. Viewed from this perspective, the district court's reasoning unravels." (App. 40a).

The court emphasized that because the 1986 Orders, as interpreted, were not limited to the bankruptcy court's *in rem* jurisdiction over estate property, but also purported to act *in personam* to bar Chubb's independent contribution/indemnity claims against non-debtor Travelers, the *in rem* "exception" relied upon by the district court to "the principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process," was inapplicable to Chubb's potential

claims. (App. 41a, citations and internal quotation marks omitted).

> Thus, contrary to the district court's ruling, the bankruptcy court was not exercising its *in rem* power when it concluded that Chubb's claims were enjoined. Therefore, the "special remedial scheme" due process "exception" relating to *in rem* bankruptcy proceedings is insufficient to sustain the bankruptcy court's action as to Chubb.

(App. 43a).

Having rejected the district court's conclusion that due process to Chubb could be measured by the standards of bankruptcy's *in rem* "special remedial scheme," the Second Circuit likewise was "unpersuaded by the district court's conclusion that Chubb's due process rights were satisfied by the bankruptcy court's August 2, 1984 Notice of Hearing . . . ." (App. 43a). "Because the 1986 Orders purport to bind Chubb's *in personam* claims," the court continued, "the better due process analogy in terms of notice and representation principles is to class action settlements, not *in rem* bankruptcy proceedings." (*Id.*)

Relying upon this Court's decision in *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591 (1997), and its own precedent in *Stephenson* v. *Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001), *aff'd in part by an equally divided court*, 539 U.S. 111 (2003), the Second Circuit did not "break any new ground" in concluding that "there can be little doubt that" Chubb received neither constitutionally sufficient notice nor constitutionally adequate representation in the proceedings leading up to the 1986 entry of the Insurance Injunction. (App. 49a).

> As to representation, there is no indication in the record that the sort of claims Chubb seeks to bring against Travelers were contemplated, much less accounted for, during the proceedings that led to the 1986 Orders. Neither Travelers nor the district court have suggested otherwise, and the terms of the bankruptcy court's August 14, 1984 Order appointing the FCR make this point plain. The bankruptcy court ordered the FCR to concern himself with "persons who have been exposed to" Manville's asbestos products and who may subsequently "manifest disease post-petition." Chubb does not fall within that category, and its interests relating to inchoate, non-derivative, post-petition claims against Travelers were not spoken for in those proceedings.
>
> We also conclude that the interests of the asbestos claimants who participated in the negotiations and hearings leading up to the 1986 Orders diverged from Chubb's future interests in a manner that precluded the claimants from adequately representing Chubb in those proceedings.

(App. 47a).

As for notice, the Second Circuit found that multiple deficiencies rendered notice inadequate as to Chubb. First, notwithstanding Chubb's supposed status as a "sophisticated insurer," the court found that Chubb could not have been expected to have the "prescience" to be able to discern from the bankruptcy court's 1984 notice "that the bankruptcy court would exceed its *in rem* jurisdiction in entering the 1986 Orders" much less to know "the factual extent of Travelers' relationship with Manville, which ulti-

mately served as the lynchpin of the bankruptcy court's 2004 interpretation of the 1986 Orders." (App. 49-50a).

Second, the court observed that even if the 1984 notice "could be interpreted to suggest that the 1984 Insurance Settlement Agreement would bar non-derivative claims against non-debtors, the parties publicly clarified their intentions by amending the agreement in a manner that indicated that Chubb was not an interested party in Manville's Chapter 11 proceedings," through the June 3, 1985 letter agreement that was incorporated into the bankruptcy court's September 26, 1985 provisional approval order. (App. 50a). Thereafter, "Chubb could not have known that it was an interested party in Manville's bankruptcy proceedings or that the 1986 Orders would bar its non-derivative *in personam* claims against Travelers." (App. 50-51a). Again relying upon *Amchem*, the Second Circuit held:

> even if Chubb received the Notice document, it could not have anticipated from the way the proceedings unfolded that its contribution and indemnity claims—which were abstract, "unimaginable," and inchoate at the time—would be enjoined. Therefore, it cannot be said that Chubb had constitutionally sufficient notice of the 1986 Orders, as interpreted by the bankruptcy court in 2004.

(App. 51a). Accordingly, as to Chubb alone, the Second Circuit reversed the district court's ruling.

REASONS FOR DENYING THE PETITIONS

I. THE SECOND CIRCUIT FAITHFULLY FULFILLED THE COURT'S MANDATE ON REMAND

In its Mandamus and Certiorari Petitions, Travelers accuses the Second Circuit of "violat[ing] this Court's mandate by reinstating the precise jurisdictional ruling that this Court reversed in *Bailey*." But that is not at all what the Second Circuit did. Moreover, Travelers' formulation of the Question Presented, and subsequent arguments, inaccurately portray this Court's holding in *Bailey*.

This Court did not disagree with the Second Circuit's conclusion that the bankruptcy court lacked subject matter jurisdiction in 1986 to enjoin non-derivative claims against Travelers. Rather, the Court's majority held that: (1) coupled with the bankruptcy court's 2004 finding that "Travelers learned virtually everything it knew about asbestos from its relationship with Manville" (App. 60-61a), the "unambiguous" language of the 1986 Insurance Injunction was broad enough to bar non-derivative claims against Travelers, and (2) *res judicata* barred parties to the 1986 proceedings "and those in privity with them" from attacking the 1986 Injunctions, which became final in 1988, on this or any other basis. (App. 71a). Notably, the two dissenting Justices who reached the jurisdictional issue agreed with the Second Circuit's holding. (App. 82-87a).

Further, this Court took care to emphasize the "narrow" scope of its holding, and that it was not "decid[ing] whether any particular respondent is bound by the 1986 Orders." (App. 74-75a). Indeed, the Court invited the Second Circuit to "take up" on

remand Chubb's contention "that it was not given constitutionally sufficient notice of the 1986 Orders, so that due process absolves it from following them, whatever their scope." (App. 75a). That is precisely what the Second Circuit did.

The Second Circuit obeyed all aspects of this Court's mandate, rejecting an attempt by the "Objecting Plaintiffs" to argue for the first time on remand that they were not adequately represented in the proceedings leading up to the 1986 Orders because this Court directed the Second Circuit only to consider properly preserved arguments. (App. 27a). Accordingly, as to every other appellant, the Second Circuit affirmed the district court's order, affirming, as modified, the bankruptcy court's "Clarifying" order.

The Second Circuit reversed the district court's order only as to Chubb, and did so on the very grounds that this Court invited it to "take up" on remand. It is true the Second Circuit revisited its prior jurisdictional holding, but that was in no sense an affront to this Court's authority. The Second Circuit was not entertaining another collateral attack by objecting asbestos claimants. Instead, that court's reaffirmation of its prior jurisdictional determination was undertaken in the distinct context of considering Chubb's due process objections—specifically, to evaluate the district court's ruling that the *in rem* nature of bankruptcy court proceedings excused compliance with otherwise applicable, "bedrock," due process requirements of adequate notice and representation. Surely, it was proper for the Second Circuit in evaluating this contention, which Travelers itself has pressed at all stages of this dispute, to determine whether the bankruptcy court in fact was acting

pursuant to its *in rem* subject matter jurisdiction over the Manville estate when it undertook in 1986 to discharge *non-derivative* present and future claims against non-debtor Travelers.

Put simply, the Second Circuit's renewal of its prior subject matter jurisdiction analysis solely in the context of evaluating Chubb's due process challenge in no sense violated this Court's mandate. To the contrary, it was part and parcel of that court's compliance with this Court's instructions on remand to consider Chubb's due process arguments.

II. TRAVELERS' ATTACKS ON THE SECOND CIRCUIT'S DECISION ARE WITHOUT MERIT

A. Chubb Is Not Bound by *Res Judicata* to Prior Rulings Regarding the Adequacy of Publication Notice

Travelers argues that Chubb is bound by the Second Circuit's holding in *MacArthur* that the notice of the insurance settlement proceedings was adequate as to MacArthur. But the Second Circuit rejected that argument because "Chubb was not a party to the 1986 proceedings and there is no indication in the record of a privity relationship between Chubb and any of the actual parties." (App. 33a). Moreover, Travelers' argument makes no sense in light of this Court's invitation to the Second Circuit—issued at the conclusion of an opinion about the *res judicata* effect of *MacArthur* on the Direct Action claimants—to "take up" on remand Chubb's due process arguments. If this Court had concluded that Chubb's due process argument was precluded by *MacArthur*, there would have been no reason for this Court to remand for consideration of this issue.

Travelers' circular argument assumes away the very issue under consideration, i.e., whether Chubb in fact was made a party to those proceedings such that its arguments are foreclosed by *res judicata*.

Indeed, it is well-settled that that the *res judicata* effect, if any, of a prior judgment upon any particular person, by definition, can be determined only in a subsequent proceeding. *See Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940). "A court conducting an action cannot predetermine the *res judicata* effect of the judgment; that effect can be tested only in a subsequent action." *Matsushita Elec. Indus. Co., Ltd.* v. *Epstein*, 516 U.S. 367, 396 (1996) (Ginsburg, J., concurring in part and dissenting in part) (citations omitted). Thus, an absentee can collaterally attack the binding effect of a class action judgment on the basis of constitutionally insufficient notice. *See, e.g., Twigg* v. *Sears, Roebuck & Co.*, 153 F.3d 1222, 1226-29 (11th Cir. 1998). Likewise, a judgment may be collaterally attacked on grounds of constitutionally inadequate representation. *See, e.g., Gonzales* v. *Cassidy*, 474 F.2d 67, 74-75 (5th Cir. 1973).

B. Bankruptcy's "Special Remedial Scheme" Does Not Contemplate Enjoining Non-Derivative Claims Against a Non-Debtor

Travelers acknowledges (Cert. Pet. at 31) that due process's requirements must be evaluated "in light of the particular governmental interests at stake." Non-debtor Travelers, however, erroneously assumes that, in cutting off independent claims against Travelers, the process due to absent and future claimants somehow is lessened because these claims are being extinguished by an Article I bankruptcy

court in the context of the settlement of separate claims by the bankruptcy debtor against Travelers, as opposed to a Rule 23 class action before an Article III court. The Second Circuit correctly rejected this assertion.

To be sure, bankruptcy is an example of "a special remedial scheme" that, if "otherwise consistent with due process," "may terminate preexisting rights" thereby "expressly foreclosing successive litigation by nonlitigants." *Martin* v. *Wilks*, 490 U.S. 755, 762 n.2 (1989). But bankruptcy is about debtors. The central purpose of bankruptcy law is "to place the property of the bankrupt, wherever found, under the control of the court, for equal distribution among the creditors." *Straton* v. *New*, 283 U.S. 318, 320-21 (1931). The justification for this "special remedial scheme" is the practical necessity of promptly adjusting these competing claims, disposing of property of the estate free and clear of any pre-existing claims or interests, and, where appropriate, sending the honest but unfortunate debtor back out into the world with a fresh economic start.

Because non-debtors have not filed for bankruptcy, they are not subject to the strictures—and their creditors do not enjoy the protections—of the Bankruptcy Code, and a bankruptcy court's *in rem* jurisdiction does not extend to property of non-debtors, such as the independent claim of one non-debtor (Chubb) against another (Travelers). Likewise, the Bankruptcy Code does not contemplate the grant of a discharge to non-debtors. Indeed, even where a non-debtor is co-liable with the debtor on a debt, the Code makes clear that a discharge of the debtor "does not affect the liability of any other entity on . . . such debt." 11 U.S.C. § 524(e). Nor (except in the specific

provisions of Section 524(g)) does the Code grant any express authority to enjoin claims against non-debtors.

Plainly, the bankruptcy court acted beyond the scope of its authority when it undertook to enjoin current and future non-derivative claims against Travelers. As importantly, its actions were beyond the scope of the justification of practical necessity undergirding this "special remedial scheme." The Second Circuit therefore was perfectly correct to reject the district court's rationale for selling short Chubb's generally-applicable constitutional due process rights to adequate notice and representation.

C. Chubb Was Entitled to Adequate Representation, Even "in the Bankruptcy Context"

Notions of due process proceed on a basic premise that a plaintiff is the master of his claim and is entitled to his own day in court. *Ortiz*, 527 U.S. at 846. Exceptions to this rule are not lightly created nor expansively construed. Even where the law permits the rights of absent parties to be concluded, due process generally requires that the plaintiff be given notice and provided an opportunity to participate or, alternatively, opt out of, the representative litigation. *See Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985). Only in the narrowest of circumstances, when it is a practical necessity, have courts permitted the adjudication of the rights of absent or unknown plaintiffs without notice, a right to participate, or a right to opt out.

In those limited situations where notice and opt-out rights are unavailable, adequate representation becomes the paramount means of assuring due

process. "[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Shutts*, 472 U.S. at 812. This is especially so when attempting to address the rights of future claimants given "the gravity of the question" of whether those "so unselfconscious and amorphous" could ever be given constitutionally-sufficient notice. *Amchem*, 521 U.S. at 628; *see also Ivy* v. *Diamond Shamrock Chems. Co. (In re Agent Orange Prod. Liab. Litig.)*, 996 F.2d 1425, 1435 (2d. Cir. 1993) ("providing individual notice and opt-out rights to persons who are unaware of an injury would probably do little good").

Central to Travelers' arguments is its contention that "in the bankruptcy context" publication notice is sufficient to bind an unrepresented future claimant, such as Chubb, to a non-debtor discharge of non-derivative claims without the benefit of virtual representation by an FCR. That is not the law, even "in the bankruptcy context."

Addressing future claims in bankruptcy, even against a debtor, is fraught with due process perils. Where it has been attempted, courts (and Congress in § 524(g)) have generally assumed that it is necessary to appoint a virtual representative for future claimants. Thus, the Third Circuit has held that due process prohibits the discharge of a future claimant's claim where "[n]o effort was made during the course of the bankruptcy proceeding to have a representative appointed to receive notice for and represent the interests of future claimants." *Jones* v. *Chemetron Corp.*, 212 F.3d 199, 210 (3d Cir. 2000); *accord Schwinn Cycling & Fitness* v. *Benonis (In re Schwinn Bicycle Co.)*, 210 B.R. 747 (Bankr. N.D. Ill. 1997) (future claimant's state-law successor liability action against

asset purcha[illegible]ot barred by § 363 "free and clear" sale order w[illegible]o FCR appointed and no provision made to pay future claims). Indeed, in *Mullane*, the petitioner was himself the "special guardian and attorney for all persons known or unknown not otherwise appearing who had or might thereafter have any interest in the income of the common trust"—i.e., a virtual representative for absent and future claimants in an *in rem* proceeding. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 310 (1950).

The bankruptcy court recognized these problems and appointed an FCR to represent future personal injury claimants against Manville. As the Second Circuit correctly concluded, however, the FCR did not represent the interests of Chubb. Indeed, even while arguing for an *in rem* due process "exception," Travelers concedes (Cert. Pet. at 27) that due process rights do not "vary depending on whether actions are *in rem* or *in personam*." Either way, therefore, future claimant Chubb was entitled to adequate representation, which it was denied because the FCR did not represent Chubb's interest in the 1980s.

D. Constitutionally Sufficient Notice of the 1986 Orders Was Never Directed Toward Chubb

Even if compliance with the virtual representation prong of due process could be excused, and even if it had been possible to give constitutionally-adequate notice to future claimant Chubb in 1986, Chubb still could not have been bound *in personam* to the 1986 Orders because, as the Second Circuit concluded, constitutionally adequate notice was neither attempted nor accomplished.

Consistent with the fact that Manville never intended to seek or obtain an injunction of claims against Travelers that were not derivative of the Policies that were estate property, Manville never sought to direct notice to those who might hold independent claims against Travelers. Instead, Manville's 1984 publication notice was only addressed to Manville's own "CREDITORS, CLAIMANTS, EQUITY SECURITY HOLDERS AND INTERESTED PARTIES." (SA-38). Chubb was not a Manville creditor, claimant, or interested security holder, and had no involvement in Manville's litigation with Travelers.

In arguing that the 1984 publication notice directed toward Manville claimants satisfied due process as to Chubb, Travelers erroneously refers to Chubb as an "interested party" in the Manville bankruptcy. The term "party in interest" generally denotes the statutorily-contemplated participants in the bankruptcy process. *See* 11 U.S.C. § 1109(b). While the term has some flexibility, *see, e.g., In re Amatex Corp.*, 755 F.2d 1034, 1041-43 (3d Cir. 1985) (future asbestos claimants against a debtor are "parties in interest" deserving of virtual representation because they have a sufficient "practical stake" in the outcome of an asbestos-driven bankruptcy), non-creditor, non-Manville insurer Chubb would not reasonably have understood that this notice was directed towards it.

Travelers further argues that because Chubb was a "sophisticated insurer," Chubb must be presumed to have received actual notice of the settlement approval proceedings. But Travelers' proffered "sophisticated insurer" exception to due process is as unsustainable as it is ironic. To satisfy due process, "notice must be the best practicable, 'reasonably

calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' . . . The notice should describe the action and the [absent parties'] rights in it." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811 (1985) (quoting *Mullane*, 339 U.S. at 314-15). The notice must be "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane* 339 U.S. at 315.

Given Travelers' concession that "Direct Action" claims were "unimaginable" in the 1980s, Chubb could not have been given meaningful notice that its rights were being affected. Moreover, sophisticated or not, Chubb was not a creditor or an insurer of Manville. Thus, even were Chubb generally aware that the Manville bankruptcy case existed, given the purposes and limitations of bankruptcy, Chubb could have had no reason to believe that the Manville bankruptcy proceedings would in any way affect Chubb or Chubb's rights against any non-debtor, including Travelers. Since no attempt was made to notify entities such as Chubb—much less to advise how their rights were at stake in the settlement hearing—it simply cannot be said that the 1984 notice was "reasonably calculated" to apprise Chubb that its rights were in jeopardy, much less the "best practicable" notice, or even notice of the sort that someone "desirous of actually informing the absentee" would have utilized.

Furthermore, Travelers completely ignores the impact of the bankruptcy court's September 26, 1985 order on the due process analysis. That order expressly incorporated the June 3, 1985 letter agreement amending the Travelers settlement to

clearly disavow any intention to obtain an injunction barring non-derivative claims against Travelers. The bankruptcy court thus assured everyone that any injunction would only implicate claims against the policies, the *res* of Manville's estate. The remaining issue to be resolved at a later date—the adequacy of the consideration Travelers was to pay Manville—was of no concern to Chubb.

If the bankruptcy court intended thereafter to enter an injunction enjoining non-derivative claims, it would have had to provide Chubb anew with constitutionally adequate notice specifically advising Chubb of this change in circumstances and giving Chubb an opportunity to be heard anew. But Travelers does not, and cannot, claim that any of the additional notices published in 1986 was either directed toward Chubb or was intended to notify Chubb that the court intended to enter an order barring current and future independent claims against Travelers.

Thus, (1) Chubb was in the position of an unrepresented future claimant in 1984-86; (2) Manville and Travelers never attempted to give constitutionally sufficient notice to Chubb; and (3) the bankruptcy court's September 26, 1985 order provided assurance that any order approving the Travelers settlement would not enjoin any entity's right to assert non-derivative claims against Travelers. Plainly, the Second Circuit was correct to conclude that Chubb was not a party to the bankruptcy proceedings because it was not "given a fair chance to challenge the Bankruptcy Court's subject matter jurisdiction," and is therefore free to "challenge it now by resisting enforcement of the 1986 Orders" as to Chubb. (App. 72a).

III. THIS CASE IS NOT AN APPROPRIATE VEHICLE TO RESOLVE THE CIRCUIT SPLIT AS TO THE POWER OR JURISDICTION OF BANKRUPTCY COURTS TO PROVIDE NON-CONSENSUAL RELEASES TO NON-DEBTORS

At the heart of Travelers' arguments is its contention that Chubb's due process rights must be measured by the standards of bankruptcy's "special remedial scheme" rather than the general principle "that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." That argument, in turn, would require this Court to address questions it avoided in *Bailey*, i.e., whether, under the Bankruptcy Code, or more fundamentally, the Constitution's bankruptcy power, "a bankruptcy court, in 1986 or today, could properly enjoin claims against nondebtor[s] . . . that are not derivative of the debtor's wrongdoing," and whether the provisions for retroactive validity of an asbestos channeling injunction under 11 U.S.C. § 524(h) are satisfied by the Insurance Injunction. (App. 75a n.9).

This case, however, does not present an appropriate vehicle for addressing such issues—indeed, these issues are not properly presented here at all. First, as demonstrated above, there is, in fact, no "exception" in bankruptcy to compliance with the constitutional due process requirements of adequate notice and representation. Thus, whether or not third party releases are permitted, they are not enforceable against those who have not received constitutionally adequate notice and/or representation.

Further, there is no circuit split over whether a bankruptcy court has authority to enjoin non-

derivative claims against a non-debtor. Indeed, the Second Circuit relied heavily in its opinions upon the Third Circuit's opinion in *In re Combustion Eng'g, Inc.*, 391 F.3d 190 (3d Cir. 2004), which held that even § 524(g) did not authorize enjoining non-derivative claims against non-debtors. Two courts of appeals have concluded that such injunctions are impermissible under any circumstances. *See In re Lowenschuss*, 67 F.3d 1394, 1401-02 (9th Cir. 1995); *In re Western Real Estate Fund*, 922 F.2d 592, 601-02 (10th Cir. 1991). Even those circuits that have permitted non-debtor releases/injunctions have done so only in the most "unusual circumstances." *See In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002). Such an injunction, the Sixth Circuit held, is permissible only when seven factors are satisfied. Specifically, among other factors, there must be "an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate," and the injunction must be "essential to the reorganization" because the reorganization "hinges on the debtor being free" from such indemnity or contribution claims. *Id.* The Sixth Circuit further required that the plan provide "a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction" as well as "an opportunity for those claimants who choose not to settle to recover in full." *Id.*

The 1986 Insurance Injunction here goes far beyond the bounds of any non-debtor release upheld by any circuit, as this case involves a release of claims that are entirely independent of any alleged liability of Manville and arises under most unusual procedural and factual circumstances. Moreover, as

interpreted by the bankruptcy court in 2004, the Insurance Injunction gave Travelers a broader release than even Manville could have obtained from the bankruptcy court because it gave Travelers immunity from suit for its allegedly tortious, post-confirmation activity after 1986 so long as that activity was based upon "knowledge" about asbestos that Travelers learned from its insurance "relationship" with Manville. Further, unlike the other cases, no provision was made to compensate Chubb for the confiscation of its potential claims against Travelers. This Court accordingly should await an appropriate case to address these issues.

IV. ADDITIONAL GROUNDS, NOT REACHED BY THE SECOND CIRCUIT, WOULD REQUIRE THAT THE CLARIFYING ORDER BE VACATED AS TO CHUBB

A. The Bankruptcy Court Lacked Subject Matter Jurisdiction to Attempt to Bind Chubb to the 2004 "Clarifying Order"

As this Court noted, the bankruptcy court's sole source of jurisdiction in 2004 was its authority to interpret and enforce the 1986 Injunctions. (App. 70a). By definition, however, this remnant enforcement power can only be exercised over the Direct Action claimants and their lawyers who allegedly violated the Insurance Injunction by suing Travelers. Chubb was not even alleged to be violating the 1986 Injunctions. The bankruptcy court therefore had no authority to hale Chubb before it, nor to "clarify" the rights of anyone other than the alleged violators.

B. The Bankruptcy Court Lacked Procedural Authority to Purport to Bind Chubb to Its 2004 "Clarifying Order"

Finally, the Clarifying Order is procedurally impermissible to the extent it purports to bind Chubb. Travelers' attempt to obtain equitable relief constitutes an "Adversary Proceeding" under Fed. R. Bankr. P. 7001, to which Fed. R. Civ. P. 23 applies through Bankruptcy Rule 7023. Clearly, the Common Law Direct Action Settlement is a class settlement intended to bind absentees (and future claimants) without compliance with Rule 23.

Among Rule 23's protections that were denied to Chubb was any effort to ensure that the procedural requisites of class treatment, which themselves are critical to due process, were satisfied. For example, the Direct Action plaintiffs and their counsel (many of whom were simultaneously suing Chubb) did not adequately protect the interests of absentees such as Chubb. The fundamental unfairness of attempting to bind Chubb to these dubious proceedings is manifest. The Direct Action claimants and their counsel had an enormous financial incentive to cooperate in getting the bankruptcy court to adopt whatever findings and conclusions Travelers desired. Furthermore, Chubb was not given notice of its right, nor was it permitted, to exclude itself from the class. Independent of the lack of subject matter jurisdiction, such mandatory, no opt-out class actions are flatly prohibited by *Amchem* and *Ortiz*.

Chubb cannot be bound jurisdictionally or procedurally to the 2004 settlement-approval proceedings that led to the issuance of the "Clarifying" order. Chubb has never been accused of violating in 1986 Injunctions, and should Travelers ever accuse Chubb

of violating the 1986 Injunctions, Chubb will be constitutionally and procedurally entitled to its own day in court. Because there is no way that Chubb could have properly been made a party to the 2004 proceedings, Chubb is in no way bound to the record that was made or to the findings and conclusions of the bankruptcy court.

CONCLUSION

The petitions should be denied.

Respectfully submitted,

WILLIAM P. SHELLEY *
JACOB C. COHN
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103
(215) 665-2000
wshelley@cozen.com

* Counsel of Record

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